

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-938

COMMONWEALTH

vs.

HECTOR JIMENEZ-SIMO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A jury convicted the defendant, Hector Jimenez-Simo, of trafficking in cocaine and possession with intent to distribute marijuana. A panel of this court affirmed the judgments in an unpublished memorandum and order issued pursuant to our rule 1:28. See Commonwealth v. Jimenez-Simo, 81 Mass. App. Ct. 1139 (2012). Thereafter, the defendant filed a motion for a new trial claiming ineffective assistance of trial counsel. The trial judge denied the motion without an evidentiary hearing, and the defendant appeals. For the reasons stated by the judge in his carefully considered memorandum of decision and order and by the Commonwealth in its comprehensive appellate brief, we affirm.

The motion alleged that counsel was ineffective because he failed to move to suppress a duffel bag (and its contents) found

in the defendant's vehicle, failed to object to items from the bag being admitted with police-generated evidence tags bearing his name, and did not object to certain testimony of the arresting police officer. In his brief, the defendant focuses on the judge's decision not to hold an evidentiary hearing.

"[A] judge may, in his or her discretion, decide a motion for a new trial without an evidentiary hearing where 'no substantial issue is raised by the motion or affidavits.'" Commonwealth v. Martinez, 437 Mass. 84, 98 (2002), quoting Mass. R. Crim. P. 30 (c) (3), 378 Mass. 900 (1979). We discern no abuse of discretion because the defendant's motion did not raise a substantial claim of ineffective assistance.

"Where a new trial is sought based on a claim of ineffective assistance of counsel, the burden of proving ineffectiveness rests with the defendant." Commonwealth v. Montez, 450 Mass. 736, 755 (2008). To prevail, the defendant must show that "(1) the conduct of his counsel fell 'measurably below that which might be expected from an ordinary fallible lawyer' [performance prong], and (2) this conduct 'likely deprived the defendant of an otherwise available, substantial ground of defence' [prejudice prong]." Commonwealth v. Henry, 88 Mass. App. Ct. 446, 452 (2015), quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

The duffel bag was in the back seat of the defendant's car when the police stopped and arrested him, and when the car was impounded and inventoried. The police, however, did not include the bag or its contents in the search warrant return and overlooked them until shortly before trial. The defendant faults counsel for not filing a motion to suppress, but his brief does not offer any legal basis for such a motion. "[I]n order to prevail on an ineffective assistance of counsel claim on the ground of failing to file a motion to suppress, the defendant has to demonstrate a likelihood that the motion to suppress would have been successful." Commonwealth v. Comita, 441 Mass. 86, 91 (2004). The failure to list the items in the search warrant return is not grounds for suppression. See Commonwealth v. Torres, 45 Mass. App. Ct. 915, 916 (1998).

Moreover, as the motion judge observed, defense counsel may have had a tactical reason not to file a motion to suppress. Counsel used the late discovery of the duffel bag to question the integrity and reliability of the police investigation, and he introduced some items from the duffel bag -- belonging to people other than the defendant -- to challenge the Commonwealth's claim that the defendant had constructive possession of other items in the car, specifically the television set in which the cocaine was hidden. The defendant's failure to show that this strategic decision was "manifestly

unreasonable" is fatal to his claim of ineffective assistance of counsel. See Commonwealth v. Ortega, 441 Mass. 170, 175 (2004).

We also agree with the judge and the Commonwealth that the defendant has failed to show prejudice. Although the Commonwealth did make use of the duffel bag and its contents in its case-in-chief and in closing argument, other evidence of the defendant's knowledge of and dominion over the contraband in the car was abundant -- and far more damaging.¹ Thus, even if counsel's failure to file a motion to suppress was conduct satisfying the performance prong, the defendant has not shown a reasonable probability that suppression of these items would have made a difference in the outcome. See Commonwealth v. Martinez, 81 Mass. App. Ct. 595, 599 (2012). Likewise, for the reasons carefully laid out by the trial judge, no prejudice arose from counsel's failure to object to the evidence tags. It

¹ In the unpublished memorandum affirming the defendant's convictions, the panel rejected his claim that the evidence of constructive possession was insufficient, setting forth the evidence that supported the defendant's guilt: "Jimenez-Simo had previously been observed making drug transactions from the same car and making countersurveillance maneuvers. A large amount of cash and a 'cuff sheet,' a form of accounting typically used by drug dealers, were found in his possession when he was arrested. The apartment in which Jimenez-Simo lived was furnished with surveillance equipment and contained a drug cutting substance. Finally, drug paraphernalia and a safe were found in his bedroom." Jimenez-Simo, 81 Mass. App. Ct. 1139. Significantly, the evidence from the duffel bag played no part in the panel's analysis.

was clear that the tags were used for administrative purposes only and had no independent evidentiary significance.

Finally, the defendant has not shown that counsel's failure to object to the police officer's testimony amounted to ineffective assistance. The officer testified that when he arrested the defendant, he told the defendant he had a search warrant for the vehicle and "had information that [the defendant] had traveled to New York to pick up cocaine." The statement was not offered for its truth, that is, that the defendant went to New York to pick up cocaine, but rather for the nonhearsay purpose of contextualizing the statements the defendant made to the officer. See Commonwealth v. Daley, 439 Mass. 558, 569 n.8 (2003); Commonwealth v. Rupp, 57 Mass. App. Ct. 377, 384 (2003). Failure to raise a futile objection is not grounds for a claim of ineffective assistance. See Commonwealth v. Carroll, 439 Mass. 547, 557 (2003); Commonwealth v. Delong, 60 Mass. App. Ct. 122, 133 n.5 (2003). Moreover, the jury heard ample evidence why the police had reason to believe the defendant was transporting drugs. The jury had no reason to suspect that the officer's testimony referred to information

provided by a confidential informant.

Order denying motion for new
trial affirmed.

By the Court (Rubin,
Massing & Englander, JJ.²),

Joseph F. Stanton

Clerk

Entered: October 28, 2019.

² The panelists are listed in order of seniority.